

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Competitive Broadband Access to)	GN Docket No. 17-142
Multiple Tenant Environments)	

COMMENTS OF INCOMPAS

Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5746

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INCOMPAS hereby submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Inquiry¹ soliciting input on ways to facilitate consumer choice and enhance broadband deployment in multiple tenant environments (“MTEs”).

I. INTRODUCTION AND SUMMARY

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications network services. We represent companies that provide residential broadband Internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. Our members are acutely aware that competition is lacking in the market for residential broadband access. Market concentration remains high and the majority of residential broadband Internet access service customers have limited options for high-speed service.² This unfortunate market trend

¹ *Improving Competitive Broadband Access to Multiple Tenant Environments*, FCC 17-78 (rel. June 23, 2017) (“MTE NOI”).

² *See* Reply Comments of INCOMPAS, WT Docket No. 16-138, *et al.*, at 8-9 (Jan. 3, 2017) (citing estimates from the FCC’s 2016 Broadband Progress Report that 10 percent of Americans have no choice of providers for fixed advanced telecommunications capability, 51 percent of Americans have only one option, and only 38 percent of Americans have a choice of more than one provider). *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

presents itself across all categories of residential properties, but is exacerbated in MTEs (also referred to as multiple dwelling units or “MDUs”). More than thirty percent of Americans live in MDUs³ and those residents have fewer options for broadband service than those living in single-family homes in the same community.⁴ In addition, service in MDUs tends to be slower and more expensive than services offered to consumers living in single-family homes.⁵ Without affordable access to robust high-speed broadband, MDU residents cannot avail themselves of the important benefits of such service, including jobs, healthcare, education, and information.⁶

Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2016 Broadband Progress Report, FCC 16-6, ¶ 86 & Table 6 (Jan. 29, 2016).

- ³ See table from the U.S. Census Bureau’s 2010-2014 American Community Survey 5-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5_YR_B25024&prodType=table (“American Community Survey”) (showing that thirty percent of American homes are in multifamily buildings).
- ⁴ See Carl Kandutsch, *Internet Choice in Apartment Buildings*, Broadband Communities, at 1 (Dec. 2016), http://www.bbcmag.com/2016mags/Nov_Dec/BBC_Nov16_InternetChoice.pdf (“It is undeniable that some owners of multiple- dwelling-unit buildings (MDUs), for the primary purpose of lining their pockets, have historically made—and still make—access deals with cable and broadband service providers that restrict or foreclose the entry of competing service providers. The result is that residents have fewer cable and broadband service provider options than their neighbors who live in single- family homes.”).
- ⁵ See *Apartment Landlords are Holding Your Internet Hostage*, BroadbandNow, July 14, 2016, <http://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/> (“*Holding Your Internet Hostage*”) (“Exclusive broadband agreements between apartment building owners and broadband providers are common, leaving renters with no choice but to pay inflated costs for sub-par service — and rewarding landlords for keeping it that way.”); cf. Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired (June 26, 2016), <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/> (“*The New Payola*”) (“This ‘riser management’ is a huge problem for the great city of New York; it’s why commercial tenants in NYC pay through the nose for awful Internet access service in the fanciest of commercial buildings.”).
- ⁶ See *MTE NOI* ¶ 1.

The Commission’s mandate is to promote competition and consumer choice, and to protect consumers in the provision of communications services.⁷ In furtherance of that mandate, over the last twenty years, the Commission has adopted several orders that reduce commercial barriers to entry, including banning exclusive service arrangements in residential MDUs, and increasing access to and use of inside wiring.⁸ Though the Commission has previously found that MDU owners and landlords typically act in the best interest of their residents, evidence of a growing disparity between consumer demand for increased Internet speeds, lower prices and competition and what MDU owners and landlords actually make available to their residents should lead the FCC to revisit its previous finding. In fact, several INCOMPAS members have routinely had property owners refuse access to MTEs despite receiving unsolicited orders for high-speed broadband service from tenants that were dissatisfied by the choices presented to them.⁹ Indeed, recent comments seeking preemption of Article 52 of San Francisco’s Police

⁷ See 47 USC § 151.

⁸ *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376, 13 FCC Rcd. 3659 (1997) (“1997 Inside Wiring Order”); *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, FCC 03-9, 18 FCC Rcd. 1342 (2003) (“2003 Inside Wiring Order”); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, 22 FCC Rcd. 20235 (2007) (“2007 Exclusive Service Contracts Order”); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, FCC 10-35, 25 FCC Rcd. 2460 (2010) (“2010 Exclusive Service Contracts Order”).

⁹ For example, in 2016, Sonic Telecom, a California-based ISP that offers a gigabit fiber service, was denied access to approximately 30 buildings in San Francisco despite receiving “hundreds of orders” from tenants. See Comments of CALTEL, Declaration of Dane Jasper, MB Docket No. 17-91 (filed May 18, 2017), at 4 (“CALTEL Comments”).

Code (“Article 52”) suggest that landlords are more interested in availing themselves of alternate revenue sources from communications providers, even where those revenue sources artificially raise costs and reduce choice for their residents.¹⁰ These practices not only harm consumers, but also harm competitive providers. New communications companies seeking a foothold in communities across the country are unable to find one because of commercial practices that monetize scarcity and reduce consumer choice. Furthermore, the inability of competitive providers to gain that foothold and access subscriber-rich areas such as MDUs can harm the economic case to build high-speed broadband across entire communities.

INCOMPAS is pleased, therefore, that the Commission has opened this proceeding. As the Commission explores means of closing the digital divide and bringing high-speed broadband service to more Americans, it should take a hard look at commercial practices in the MDU market and how those practices reduce choice for MDU residents and restrict competition. The market for broadband access in MDUs has evolved. Today, this market is very different than it was twenty, and even ten, years ago. Consumers have enthusiastically adopted over-the-top services such as VoIP and streaming video, which has revolutionized how Americans view content. Over 65 million homes subscribe to an online video service making the availability of

¹⁰ See Comments of Engine Advocacy on Petition for Preemption of the Multifamily Broadband Council (“MBC Petition”), at 2 (May 18, 2017) (describing how revenue sharing arrangements increase costs for residents in order to provide landlords with additional revenue); *cf.* Comments of the Fiber Broadband Association (“FBA”) on MBC Petition, at 15-16 (May 18, 2017) (noting that MBC’s petition suggests “that introducing a competing service within an MDU will negatively impact the revenues that its operator members get from being the sole provider”). Unless otherwise noted, all citations herein to comments and reply comments are in MB Docket No. 17-91.

high-speed broadband that much more important to mass-market customers.¹¹ The time is ripe for the Commission to take another look at the state of competition in apartment buildings, condominium buildings, cooperatives, and commercial venues.

Specifically, INCOMPAS asks the Commission to undertake a thorough investigation of the use of graduated revenue sharing and wiring exclusivity agreements between communications providers and landlords. These pernicious practices result in higher costs to consumers, increase the costs of competitive entry, reduce choice, and circumvent the Commission's wiring rules and prohibition of exclusive service contracts.

INCOMPAS also encourages the Commission to revisit other practices, such as bulk billing agreements and marketing exclusivity agreements that have been used as artificial barriers to deny competitors access to MTEs. The Commission should ensure that, to the extent it continues to permit such arrangements, they are not used to prevent competition and harm consumers.

Finally, INCOMPAS asks the Commission to continue its deference to state and local jurisdiction in matters of landlord and tenant relationships by refusing to preempt state and local mandatory access laws. For many years, the Commission has acknowledged state and local interests in promoting competition and consumer choice, while encouraging state and local governments to reform their mandatory access laws to avoid any anticompetitive impact. Now that those governments are beginning to address lack of competition and consumer choice through passage of a new generation of mandatory access laws, the Commission should encourage, and not stifle, those reform efforts.

¹¹ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report, MB Docket No. 16-247, DA 17-71, at 620, ¶ 131 (Jan. 17, 2017).

II. COMPETITION IS LACKING IN THE MDU MARKET.

Residents of MDUs often have little choice when it comes to selecting a communications provider.¹² Even in places where there is more than one option, service providers are selected by the owner of the building and residents often cannot get service from other companies.¹³ The result is that new offerings—from competitive fiber to wireless last mile services—are simply unavailable to many MDU residents. Because MDU residents make up a significant and growing percentage of the American population,¹⁴ preventing such competitive providers from offering service to these customers shuts them off from a very important market segment, which ultimately harms consumers.

The Commission has previously found that landlords of MDUs can be presumed to act in the best interest of their residents.¹⁵ But landlords' incentives can be flipped where they become beholden to alternative revenue sources under certain kinds of commercial arrangements with communications providers, such as revenue sharing agreements. In the experience of Windstream, an INCOMPAS member, a significant percentage of MDU owners will not engage

¹² See *The New Payola; Holding Your Internet Hostage*.

¹³ Lack of consumer choice in MDUs was a driving motivation behind the passage of San Francisco's Article 52 and other mandatory access laws. See Comments of FBA on MBC Petition at 4-5, 8.

¹⁴ See American Community Survey; see also *The State of The Nation's Housing*, Joint Center for Housing Studies of Harvard University, at 25 (2017), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_state_of_the_nations_housing_2017_chap5.pdf (finding that the number of rental households has increased by more than 10 million since 2005).

¹⁵ See *2003 Inside Wiring Order* ¶¶ 14-15 (stating that the Commission believed MDU owners would "recognize tenants' interests" and declining to give subscribers, rather than property owners, the right to choose among providers).

any competitive providers at all unless they receive a “door fee”¹⁶ or a better revenue share, despite overwhelming demand in their buildings. Moreover, given the growing shortage of housing in many urban environments and the high switching costs for residents even in competitive housing markets, MDU residents often cannot simply move to another building with better service options. The result is that residents are deprived of choice, costs for mediocre service increase, and new providers are shut out of the MDU market.

While landlords would argue that they must compete for residents and thus are incented to offer access to better, faster, and cheaper services, in today’s housing market, residents have much less bargaining power than they may once have had. Even in competitive housing markets, switching costs for residents are high. MDU leases are typically for at least one year, if not two or more years. Moving is expensive, involving many costs for the resident, from hiring movers to placing deposits on a new unit. In tight housing markets, including major metropolitan and rapidly growing urban areas, a resident may have difficulty finding new housing at a reasonable cost or in the needed timeframe. Switching costs are particularly burdensome for poorer and at-risk communities where MDU residents have little ability to bear the costs of finding suitable alternative housing. (In addition, when choosing a residence, tenants are likely giving far more consideration to factors such as rental costs and location than whether there will be competitive broadband options in their new building.) Recent studies have shown that American mobility is, on the whole, dramatically reduced over the last several years,¹⁷ at

¹⁶ *MTE NOI* at n.39.

¹⁷ U.S. Census Bureau, *Americans Moving at Historically Low Rates*, *Census Bureau Reports*, Release No. BC16-189 (Nov. 16, 2016).

least some of which is attributable to reduced supply of housing.¹⁸ In this environment, landlords wield greater power over residents and consumers have a reduced ability to choose among buildings based on what communications providers serve those buildings. The result is that MDU residents have reduced ability to choose between buildings on the basis of the available broadband service and are, in effect, a captive audience for the landlord.

III. THE COMMISSION SHOULD INVESTIGATE THE ANTI-COMPETITIVE EFFECTS OF GRADUATED REVENUE SHARING ARRANGEMENTS IN MDUS.

Given the state of the MDU market, INCOMPAS encourages the Commission to take a close look at certain commercial arrangements that have a particularly negative effect on competition. The most pernicious of these practices is graduated revenue sharing agreements between communications providers and landlords.¹⁹

Under a revenue sharing arrangement, a communications provider pays a landlord a “bounty” for each resident that subscribes to that provider’s service.²⁰ Typically, these contracts establish a formula setting out a variable percentage of the revenue earned by the provider in the MDU which is paid back to the landlord in cash on a quarterly or monthly basis.²¹ These formulas determine the revenue percentage based on both penetration rates (the percentage of

¹⁸ See, e.g., Andrea Riquier, *Rental Income Just Hit an All-Time High. Here’s How That Drives a Wedge Between ‘Haves’ and ‘Have-Nots’*, MARKETWATCH (May 1, 2017), <http://www.marketwatch.com/story/rental-income-just-hit-an-all-time-high-heres-how-that-drives-a-wedge-between-haves-and-have-nots-2017-05-01%20>.

¹⁹ Graduated revenue sharing agreements should be distinguished from agreements in which landlords receive payments that are tied to actual costs for the provider’s use of the property. While these kinds of arrangements can also be considered revenue sharing in the broadest sense, they do not have the same anti-competitive impact. INCOMPAS’s references herein to revenue sharing refer to graduated revenue sharing, as described in this section.

²⁰ See *The New Payola*.

²¹ See *id.*

units that subscribe to the provider's service) and revenue per unit (which increases as residents subscribe to premium services).²² In short, revenue sharing is a kickback from the provider to the landlord.²³

The effect of revenue sharing—if not the outright purpose—is to stifle competition. As INCOMPAS noted in its reply comments on MBC's petition for preemption, the use of revenue sharing arrangements has created an expectation on the part of landlords, such that competitive broadband and video providers that are unable or unwilling to participate in revenue sharing schemes are denied access to MDUs.²⁴ Landlords have no incentive to grant access to competitive providers when any subscriber gained by that provider means reduced income to the landlord. Those types of arrangements create perverse incentives to bar competition and keep prices high, and the predictable (if not intended) result is that MDU residents are deprived of competitive options.²⁵ Moreover, residents are likely to face higher prices for the service that is available, as landlords are rewarded when revenues per unit increase. On top of it all, residents usually have no idea that their landlord receives a kickback from their communications provider. They are simply told that competitive services are not available in their building.

²² *See id.*

²³ Such kickback arrangements in other contexts—specifically, payola—are unlawful and prohibited under the FCC's rules. *See* 47 C.F.R. §§ 73.1212, 76.1615.

²⁴ *See* Reply Comments of INCOMPAS on MBC Petition at 4 (June 9, 2017).

²⁵ Indeed, incentives under a revenue sharing regime are so perverse that a cheaper and faster competitive service option demanded by a high number of residents in an MDU poses the greatest threat to the landlord's expected revenue. Such practices run contrary to the Commission's mandate.

Revenue sharing, moreover, has no upside for consumers. In this respect, it is distinct from bulk billing arrangements. The Commission has acknowledged that bulk billing has the potential to reduce competition, but found that the benefits of bulk billing outweigh those negative effects.²⁶ In contrast to revenue sharing, bulk billing arrangements can reduce consumer costs because of the availability of wholesale rates. While bulk billing may reduce the likelihood that residents will seek out an alternative service—because they are already paying for the incumbent’s bulk service—the Commission has found that to be an acceptable trade off because the bulk billed service is offered at a lower price.²⁷

Revenue sharing, on the other hand, has essentially no potential to reduce costs or increase choice. The best that can be said about revenue sharing is that it may help some small providers that lack substantial capital resources gain a foothold in an MDU to justify their infrastructure investments.²⁸ But that benefit is also available with bulk billing.²⁹ Ensuring returns on investment does not require that incumbents erect the types of barriers to entry (with no associated consumer benefit) that revenue sharing poses. Indeed, advancing competition

²⁶ See *2010 Exclusive Service Contracts Order* ¶¶ 26-27; see also *id.* ¶ 2 (“Bulk billing arrangements may deter second video service providers from providing service in such buildings because residents are already subscribed to the incumbents’ services and residents would have to pay for both MVPDs’ services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD from providing its services to those residents.”).

²⁷ *Id.* ¶ 26.

²⁸ Cf., e.g., Comments of the National Multifamily Housing Council (“NMHC”) on MBC Petition at 10 (May 18, 2017).

²⁹ Indeed, proponents of bulk billing argue that this is one of the primary reasons the Commission should be careful to preserve the ability of providers to enter into bulk billing agreements. See Comments of NMHC on MBC Petition at 7-9; Reply Comments of MBC to MBC Petition at 29-30 (July 9, 2017).

within MDUs must be the Commission's ultimate goal in this proceeding if it seeks to increase investment (in addition to competition and consumer choice), as it has found that there is no evidence that exclusive service arrangements—however they come about—are correlated with significant investment by incumbents.³⁰

Though bulk billing is an imperfect practice, INCOMPAS believes the Commission should continue to allow it for the aforementioned reasons for residential service only and when it is not otherwise used to exclude competitive options. Because bulk billing arrangements are regularly paired with other features that undermine overall competitive benefits,³¹ INCOMPAS requests that the Commission clarify what providers are allowed to do under the rubric of bulk billing. Specifically, INCOMPAS asks the Commission to state that providers should not be permitted to use bulk billing arrangements as a pretext to bar competition in all cases.³² Nor should providers be allowed to pair bulk billing with other anti-competitive arrangements—namely, wiring exclusivity (which is discussed in more detail below). Finally, the Commission should clarify that its decision to allow providers to enter into bulk billing agreements does not have any effect on state and local laws promoting competition that may impose other restrictions on bulk billing arrangements.

³⁰ *2007 Exclusive Service Contracts Order* ¶ 28 ("there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers couple exclusivity clauses with significant new investments . . .").

³¹ *See, e.g.*, Comments of NMHC on MBC Petition at 7-9; Reply Comments of MBC on MBC Petition at 29-30 (suggesting that bulk billing can only be successful where coupled with wiring exclusivity).

³² *See 2007 Exclusive Service Contracts Order* ¶ 65 (stating that providers may not use bulk billing arrangements to "prohibit MDU residents from selecting a competitive video provider").

INCOMPAS also encourages the Commission to conduct additional fact gathering on the real impact to consumers and new entrants of bulk billing. For instance, the Commission's inquiry in this proceeding would benefit from learning whether landlords view the ability to mark up the wholesale cost of service as primarily a means of gaining an additional or ancillary revenue stream, as well as how the potential for lower costs to customers is undermined where customers are unaware of the actual rate they are paying for bulk services.

IV. THE COMMISSION SHOULD REVISIT ITS EXCLUSIVITY RULES.

The Commission's approach to imposing limits on exclusivity in the MDU market has been a measured one. Over a ten-year period, the Commission repeatedly declined to prohibit exclusive contracts in MDUs until the evidence in the record showed the harms to competition outweighed the benefit to consumers.³³ In acting to ban exclusive contracts, the Commission declined to extend its findings to other arrangements, allowing MVPDs to continue to negotiate exclusive marketing contracts and bulk billing arrangements,³⁴ finding insufficient evidence that the competitive harm from these practices outweighed the benefits to residents.

³³ Compare, e.g., *1997 Inside Wiring Order* ¶ 2 (“We will not prohibit service providers from entering into exclusive contracts with property owners.”) and *2003 Inside Wiring Order* ¶ 60 (“[W]e find that the record is inconclusive regarding anti-competitive effects of exclusive and perpetual contracts and does not support government intervention with such privately negotiated contracts.”) with *2007 Exclusive Service Contracts Order* ¶ 1 (“[W]e find that contractual agreements granting such exclusivity to cable operators harm competition and broadband deployment and that any benefits to consumers are outweighed by the harms of such clauses.”). See also *2010 Exclusive Service Contracts Order* ¶ 4 (“Our decisions in this *Second Report & Order* are based on our view of the effects on consumers of the practices addressed herein We may re-examine one or both of these practices in the years ahead to see if those effects have changed.”).

³⁴ See *2010 Exclusive Service Contracts Order* ¶¶ 2-3.

Ten years later, it is time for the Commission to once again revisit those conclusions. Today, most communications providers cannot execute exclusive service agreements in MDUs.³⁵ However, that does not mean they do not continue to take steps to ensure they are the only providers in a building.³⁶

A. The Commission Should Prohibit Wiring Exclusivity Agreements.

Various forms of exclusivity agreements in MDUs are used by communications providers, but the one that represents the most harm to competition is wiring exclusivity agreements. Under such agreements, communications providers enter into agreements under which they obtain exclusive right to access and use wiring in a building.³⁷ These exclusive wiring agreements amount to an end run around the Commission's existing cable inside wiring rules, which were created to promote competition and consumer choice.³⁸ In many cases, in fact,

³⁵ The Commission's prohibition on exclusive contracts applies only to providers subject to Section 628 of the Communications Act, and thus does not reach private cable operators ("PCOs") or direct broadcast satellite ("DBS") providers. *2007 Exclusive Service Contracts Order* ¶ 32.

³⁶ Indeed, these practices have been in common use since shortly after the Commission adopted its exclusivity prohibition in 2007. *See* Comments of Marco Island Cable, MB Docket No. 07-51 (Feb. 2008) (describing egregious methods used by a cable incumbent to achieve *de facto* exclusivity in an MDU despite the 2007 prohibition on exclusive contracts in MDUs).

³⁷ *See Exclusive Use of Inside Wiring Clauses in Cable ROE Agreements*, Carl Kandutsch Law Office (May 2, 2014), <http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements>.

³⁸ *See* Comments of FBA on MBC Petition at 20-21.

such agreements plainly violate the Commission’s rules.³⁹ Such arrangements are nothing more than an attempt to avoid the prohibition on exclusive contracts and should be disallowed.⁴⁰

Exclusive wiring agreements foreclose competition without any benefit to consumers. Though some landlords and service providers argue that exclusive wiring arrangements are somehow tied to providers’ ability to provide high-quality service,⁴¹ this is a false nexus and the Commission should reject these arguments. There is no legitimate reason why good service presupposes exclusive wiring—for instance, one of our members, Google Fiber, has the highest consumer satisfaction in the market.⁴² On this point, the Commission has previously found that arguments trumpeting the benefits of exclusivity lack credence. In 2007, responding to claims that exclusive service arrangements promote investment, the Commission found that “there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers

³⁹ See *id.* (“If the incumbent provider transfers legal title to its home wiring to the property owner before a customer terminates service and then leases it back with an exclusivity provision that prevents competitive use, the inside wiring will be unavailable for use by competitors when the customer is ready to change providers. The Commission forbade this scenario [in] Section 76.802(j) of its cable home wiring rules . . .”).

⁴⁰ See Comments of Marco Island Cable, MB Docket No. 07-51 (Feb. 5, 2008) (describing emails from a cable incumbent in which it acknowledged using exclusive wiring agreements to circumvent the 2007 prohibition on exclusive contracts in MDUs).

⁴¹ See, e.g., Comments of NMHC on Petition for Preemption of MBC at 11 (“Providers will have a decreased incentive to contractually agree to invest in facilities upgrades or provide quality maintenance if third-party providers can access their wiring . . .”).

⁴² *Consumer Reports: Dissatisfaction with Cable TV Remains High As Cord-Cutters Gain Intriguing New Options*, Consumer Reports, June 20, 2017, http://www.consumerreports.org/media-room/press-releases/2017/06/consumer_reports_dissatisfaction_with_cable_tv_remains_high_as_cord-cutters_gain_intriguing_new_options/ (“The standouts for TV service in CR’s ratings were EPB Fiber, a municipal broadband service run as a public utility in Chattanooga, Tennessee, and Google Fiber, a service offered by Google in a handful of markets.”). In fact, to our knowledge, INCOMPAS members do not engage in these exclusive wiring arrangements.

couple exclusivity clauses with significant new investments”⁴³ There is simply no evidence that exclusive rights—whether to access a building’s residents, or to the wiring in a building—have any relationship to a provider’s willingness to install, upgrade, or maintain facilities. Providers are not prevented from installing, upgrading, or maintaining wiring by allowing new competitors to offer service in a building. As FBA noted in its reply comments on MBC’s petition, “exclusive arrangements do not promote good, let alone state-of-the-art, service, but rather ‘insulate the incumbent from any need to improve its service.’”⁴⁴

B. The Commission Should Review the Competitive Impact of Other Forms of Exclusivity Agreements.

Many incumbent providers in MDUs also require landlords to grant other forms of exclusive rights. Some of those rights, such as marketing exclusivity, have been allowed by the Commission.⁴⁵ Other forms, including exclusive rooftop rights, have never been considered by the Commission. In reviewing the competitive landscape in MDUs, the Commission should collect information on how these kinds of agreements are used, and whether the benefit to consumers of these arrangements outweighs the potential for competitive harm.

For instance, INCOMPAS members have found that, while marketing exclusivity has a lesser impact on competition than wiring exclusivity, the existence of these agreements limits the manner in which information is distributed to tenants and has the potential to create confusion by the landlord about what is and what is not allowed. In many cases, providers use these agreements as artificial barriers to frighten building owners into disallowing many practices that

⁴³ *2007 Exclusive Service Contracts Order* ¶ 28.

⁴⁴ Reply Comments of FBA to MBC Petition at 7 (citing *2007 Exclusive Service Contracts Order*).

⁴⁵ *2010 Exclusive Service Contracts Order* ¶ 3.

are not, and should not be considered, marketing.⁴⁶ And while the idea of marketing exclusivity seems a bit absurd in this era of free-flowing information from many sources, perpetuating the ability of incumbents to restrict certain forms of advertising from reaching MDU residents is likely to disadvantage precisely those customers with the least ability to obtain access to that information because of limited access to the internet and various forms of media.

INCOMPAS members like Rocket Fiber, which offers a gigabit fiber service in Detroit, have also found that exclusive marketing arrangements dilute the odds of a competitive provider being able to achieve penetration rates that bring an acceptable return on investment. In one instance, Rocket Fiber was delayed from deploying to a 300-unit MDU for over a year when a property owner, who already had an exclusive marketing arrangement with the incumbent provider, demanded a revenue share equal to or greater than that rendered by the incumbent which could advertise its services throughout the entire building. Despite having over 100 requests for service from tenants, Rocket Fiber was unable to meet the revenue sharing requirements and was subsequently blocked from entering the property. In some other cases, the length and complexity of access or right of entry agreements serve to confuse the property owner about what competitive providers are allowed to do at the property in terms of marketing their services (or in many cases even their rights to access the landlord's inside wiring). Most exclusive marketing agreements extend for 10-12 years, and transfer to new owners in the event a MTE is sold, often without the new owners' awareness. Competitors seeking to gain access to a building are often required to educate new owners on their rights and obligations. Rocket Fiber

⁴⁶ For instance, INCOMPAS members have been told they may not send installers to an MDU wearing clothing with a company logo on it, or even install equipment marked with the company's name or logo. *See also The New Payola* (featuring correspondence from Comcast following the inadvertent breach of the terms of an exclusive marketing arrangement).

has indicated that delays related to these marketing agreements normally take weeks as property owners seek to understand competitors' access rights.

Rooftop exclusivity agreements, on the other hand, are fundamentally identical to wiring exclusivity agreements; like wiring exclusivity agreements, they provide essentially no benefit to consumers. These arrangements are used by fixed wireless communications providers to prevent competitors from gaining access to space on a building roof for point-to-point wireless services. Such agreements deny access to a building's rooftop facilities to competitive service providers even where the facilities can accommodate more than one provider. INCOMPAS members recognize that interference issues may prevent placement of new wireless facilities in proximity to another provider's antennas, but agreements that flatly prohibit on use of rooftop space by subsequent providers are anticompetitive and should, like wiring exclusivity agreements, be prohibited.

It should be noted that exclusivity agreements are not simply limited to residential MTEs. INCOMPAS members that provide high-speed broadband service to enterprise and individual customers have encountered resistance from owners of multi-tenant public spaces—such as sports stadiums and shopping malls—when attempting to provide a wireless broadband service via small cells and distributed antenna systems (“DAS”). Commercial and public venues are increasingly bestowing private access agreements on national wireless carriers and requiring that competitive providers lease capacity on that carrier's facilities (which is often just a single DAS). These carriers benefit from these private access agreements by charging monopoly rents on access to their facilities. INCOMPAS members who are subject to this practice report that these rents—which are levied in various forms of charges including up-front fees, monthly rental charges, and system adaption fees—often exceed the cost of installing their own equipment,

which is already calibrated to accommodate the provider's data demands. Ultimately these arrangements lead to unnecessary cost increases and decreased investment in new generation networks. Like other exclusivity arrangements, private access agreements that impede competitive providers access to commercial MTEs should be prohibited.

C. The Commission Should Revisit Its Authority to Prohibit Exclusivity Contracts by PCOs.

Finally, INCOMPAS encourages the Commission to take up the deferred question whether it should extend its prohibition on exclusivity contracts to private cable operators ("PCOs").⁴⁷ In 2007, the Commission concluded that the record did not support extending that obligation to PCOs and direct broadcast satellite ("DBS") providers.⁴⁸ It asked for further comment on that decision, but has to date not taken further action. INCOMPAS encourages the Commission to revisit that issue now, to determine whether the same reasons that justified adoption of the exclusivity prohibition in 2007 for certain MVPDs would justify a similar prohibition for other providers today.⁴⁹

For instance, in 2007, the Commission noted that exclusive contracts "can insulate the incumbent MVPD from any need to improve its service,"⁵⁰ and the MVPD "would have no

⁴⁷ *2007 Exclusive Service Contracts Order* ¶ 6 n.12 ("PCOs are . . . video distribution facilities that use closed transmission paths without using any public right-of-way.").

⁴⁸ *2007 Exclusive Service Contracts Order* ¶¶ 32, 61.

⁴⁹ *See* Comments of the City and County of San Francisco on MBE Petition for Preemption at 8-9 ("As some PCOs note, they were the entities that 'directly benefited from the FCC's inside wiring rules' because previously 'PCOs were shut out from being able to serve thousands of communities, due to anti-competitive agreements signed by large providers.' Yet, those same PCOs now want the Commission to preempt the City's ordinance so that they can continue to rely on their own 'anti-competitive agreements' to 'shut out' their competitors.").

⁵⁰ *2007 Exclusive Service Contracts Order* ¶ 22.

incentive to hold down prices within the MDU.”⁵¹ The Commission found that every aspect of MVPD service is potentially impacted by exclusivity contracts, from available programming to price.⁵² Those issues were true in 2007 and remain true today.⁵³ While PCOs and other small providers argued that exclusivity contracts were necessary to allow them to gain a foothold in the market, that rationale does not justify a permanent exemption from this important pro-competitive rule. PCOs today, much like cable incumbents ten years ago, use exclusive contracts to entrench in MDUs, which reduces customer choice and increases costs.⁵⁴

V. THE COMMISSION SHOULD ENCOURAGE ADOPTION OF PRO-COMPETITION MANDATORY ACCESS LAWS.

The Commission has long recognized the competitive benefits of mandatory access laws, and, when necessary, been willing to examine potential concerns over the use of these laws for

⁵¹ *Id.* ¶ 17.

⁵² The Commission made similar findings in 2000, when it adopted rules designed to promote competition for telecommunications services in MTEs. *See Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, ¶ 1 (2000) (“[W]e further our efforts under the Telecommunications Act of 1996 to foster competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments...”).

⁵³ *See, e.g.*, Comments of FBA on MBC Petition at 20-21; Comments of Engine Advocacy on MBC Petition at 2; Reply Comments of INCOMPAS on MBC Petition at 5.

⁵⁴ After receiving a request from a condominium association, one of our members attempted to serve a complex in Nashville that had an exclusive arrangement with a PCO. The incumbent PCO immediately sent cease and desist letters to the provider and to the association asserting service exclusivity and refusing to renegotiate. Despite overwhelming customer demand and repeated attempts to gain access, our member has not been able to serve this community.

anti-competitive means.⁵⁵ Mandatory access laws arose at a time when cable companies were just beginning to offer service, and landlords were unwilling to provide those companies access to their buildings.⁵⁶ Born in an age where the only incumbent provider was the telephone company, mandatory access laws essentially served as consumer protection laws and granted specific rights to franchised cable operators.⁵⁷ But over the years, this formulation has served to grant those cable operators special treatment over new entrants, with the potential for anti-competitive results.⁵⁸ Notwithstanding that potential, the Commission has repeatedly declined to preempt such laws, instead encouraging states and local governments to recognize the potential for competitive harm and reform their laws accordingly.⁵⁹

That is exactly what San Francisco did when it adopted Article 52.⁶⁰ Article 52 is a mandatory access law that avoids the problems previously acknowledged by the FCC. Article 52 promotes competitive broadband deployment while specifically addressing the anticompetitive practice of wiring exclusivity.⁶¹ Rather than codifying special treatment for one kind of provider—franchised cable operators—Article 52 requires building owners to provide access to

⁵⁵ 2003 *Inside Wiring Order* ¶¶ 36-39.

⁵⁶ *See id.* ¶ 35.

⁵⁷ *See id.*

⁵⁸ *Id.* ¶ 39.

⁵⁹ *Id.* (“[W]e urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if such competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers.”).

⁶⁰ *See* Comments of the City and County of San Francisco on MBC Petition at 1, 3-6.

⁶¹ *See id.* at 5, 7-8; Comments of FBA on MBC Petition at 8-13.

all communications providers who qualify under the law.⁶² Article 52 puts the choice of provider back in the hands of the consumer, allowing residents to decide when and if to switch services.⁶³ Other cities and governments are following San Francisco's example.⁶⁴

Sonic Telecom is just one provider that has been able to take advantage of the pro-competitive nature of the ordinance. In 2016, Sonic, which provides a facilities-based gigabit fiber service, was able to generate a list of “approximately 30 buildings where the property owners had refused to allow [the provider] access to the building” despite receiving hundreds of orders from tenants.⁶⁵ Since Article 52 went into effect in January 2017, Sonic “has been significantly more successful in gaining access to MDUs in San Francisco”⁶⁶ realizing a 2016 commitment to “helping San Franciscans get access to Internet at gigabit speeds.”⁶⁷

As the Commission continues to investigate the best ways to close the digital divide and facilitate access to high-speed broadband services by all Americans, INCOMPAS encourages the Commission to look to Article 52 as a potential model, or at least a starting point, for state and

⁶² See Comments of the City and County of San Francisco on MBC Petition at 6-7.

⁶³ Contrary to allegations of MBC and others, see Petition for Preemption of MBC at 3 (Feb. 24, 2017), Comments of NMHC on MBC Petition at 5, Article 52 does not mandate wire sharing and only allows a competitive provider to offer service using inside wiring not already in use by another provider. See Comments of FBA on MBC Petition at 22-23. In this respect, Article 52 ensures that the inside wiring rules operate as the Commission intended, preventing incumbent providers from preventing a resident from transferring their services from one provider to another.

⁶⁴ See Reply Comments of the City of Boston, Massachusetts on MBC Petition at 8.

⁶⁵ CALTEL Comments, Declaration of Dane Jasper, at 4.

⁶⁶ *Id.* at 6.

⁶⁷ Dane Jasper, *Dear Mr. President*, Sonic Blog (June 20, 2016), <https://corp.sonic.net/ceo/2016/06/20/dear-mr-president/>.

local governments interested in improving access to MDUs by broadband providers.⁶⁸ State and local regulations like Article 52 promote broadband deployment by reducing barriers to entry for new providers. This in turn gives consumers access to more service offerings, driving incumbents to expand and improve services as well as to lower prices.⁶⁹

VI. CONCLUSION

INCOMPAS is pleased that the Commission is exploring ways to accelerate broadband deployment, including by improving the market for competition in the MDU market. The Commission should take this opportunity to investigate the continued use of anti-competitive commercial arrangements in MDUs, including revenue sharing agreements and wiring exclusivity agreements. It should also collect information on the use of bulk billing and exclusive marketing agreements to ensure that the benefits to consumers of such practices continue to outweigh the competitive harm that results. The Commission should encourage state and local governments to adopt or reform pro-competition mandatory access laws that can complement the Commission's own rules in seeking to close the digital divide.

⁶⁸ The Commission may adopt rules governing anti-competitive behavior by communications providers so as to facilitate broadband deployment and consumer choice, but its authority is limited, particularly when it comes to state and local property rights. *See, e.g., 2007 Exclusive Service Contracts Order* ¶ 37 (noting that rights of MDU owners are governed by state property laws).

⁶⁹ *See, e.g., Ben Popper, AT&T Announces It Will Match Google Fiber's Price and Speed in Kansas City*, The Verge, Feb. 17, 2015, <https://www.theverge.com/2015/2/17/8050935/att-google-fiber-kansas-city-gigapower-internet-price-match>.

Respectfully submitted,

INCOMPAS

/s/Christopher L. Shipley

Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5746

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